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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
9 (HONORABLE JANIS L. SAMMARTINO)

10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 v.
13 CARLOS ESTRADA-JIMENEZ,
14 Defendant.

CASE NO. 07cr3209-DLS

MEMORANDUM OF POINTS AND
AUTHORITIES REGARDING THE
DEFENSE OF OFFICIAL RESTRAINT


15
16 **I.**

17 **MEMORANDUM REGARDING THE DEFENSE OF "OFFICIAL RESTRAINT"**

18 As counter-intuitive as it may sound, under Ninth Circuit law, a person has not
19 "entered" the United States—despite being physically present in the United States—if that
20 person has been continually surveilled by law enforcement. Such surveillance, known as
21 "official restraint," is a perfect defense to the charge of being "found in" the United States.¹

22 When the government elects to indict a person under the "found in" portion of
23 8 U.S.C. § 1326, the government must do more than demonstrate that a defendant was
24 physically found within the United States. In this Circuit, "[p]hysical presence [in the United
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26
27 ¹The government's weapon against a defense of "official restraint" is to simply
28 indict its case correctly—as an *attempted* entry under 8 U.S.C. § 1326. See *United States v. Leos-Maldonado*, 302 F.3d 1061, 1063-64 (9th Cir. 2002).



1 States] is insufficient to sustain a conviction of being ‘found in’ the United States.” *United*
2 *States v. Cruz-Escoto*, 476 F.3d 1081, 1085 (9th Cir. 2007) (citation omitted). “The
3 government must also prove that [an] individual ‘entered the United States free from official
4 restraint at the time officials discovered or apprehended him.’” *Id.* Where there is evidence
5 to support an inference that a person entered the United States under official restraint, the
6 “burden is on the government to establish lack of official restraint.” *Id.*; *see also United*
7 *States v. Bello-Bahena*, 411 F.3d 1083, 1090 (9th Cir. 2005).

8 “An alien is under ‘official restraint’ if, after crossing the border without
9 authorization, he is ‘deprived of [his] liberty and prevented from going at large within the
10 United States.” *Cruz-Escoto*, 476 F.3d at 1085 (citation omitted) (bracket in original). An
11 “alien does not have to be in the physical custody of the authorities to be officially restrained;
12 rather, the concept of official restraint is interpreted broadly [and the] restraint may take the
13 form of surveillance, unbeknownst to the alien.” *United States v. Gonzalez-Torres*, 309 F.3d
14 594, 598 (9th Cir. 2002). In other words, when “under surveillance, the alien has still not
15 made an entry despite having crossed the border with the intention of evading inspection,
16 because he lacks freedom to go at large and mix with the population.” *Id.* (internal quotation
17 marks omitted). In short, long-distance surveillance of a person qualifies as “official
18 restraint.” *See id.*; *see also Bello-Bahena*, 411 F.3d at 1090.

19 As one panel of the Ninth Circuit summarized this Circuit’s doctrine of “official
20 restraint”

21 In those cases, where the aliens are caught right at the fence, under
22 the full gaze of human eyes and electronic surveillance, we hold
23 that they are not “in” the United States to be “found in.” If they get
out of sight for some substantial period, they are “in.”

24 *United States v. Zalvala-Mendez*, 411 F.3d 1116, 1119 (9th Cir. 2004).

25 The upshot of the government indicting a person who was under “official
26 restraint” under the “found in” portion of 8 U.S.C. § 1326 is a judgement of acquittal. *United*
27 *States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir. 2000) (“because he was never free
28 from official restraint, he did not commit the crime of being found in the United States.

1 Therefore, a judgment of not guilty must be entered.”); *see also Gonzalez-Torres*, 309 F.3d
2 at 598 (“Torres’ motion for acquittal should have been granted because Torres failed to
3 ‘enter’ the United States.”).

4 **II.**

5 **CONCLUSION**

6 Mr. Estrada-Jimenez requests the Court consider this memorandum when ruling
7 on his motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, or
8 alternatively, consider this memorandum when ruling on his request for a theory of defense
9 instruction.

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12 Dated: April 7, 2008

Respectfully submitted,


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